

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 23, 2003 Session

LORENZO C. WHITE, ET AL. v. CAROLYN FIELDS HAYES, ET AL.

**Appeal from the Chancery Court for Tipton County
No. 16,650 Martha B. Brasfield, Chancellor**

No. W2002-00669-COA-R3-CV - Filed September 15, 2003

This is a will construction case. The testator's will devised his estate to his children, then to his grandchildren, then to his great-grandchildren. When the great-grandchildren became of age, the estate was to be divided "as law directs." The plaintiffs, great-grandchildren of the testator, filed this action seeking interpretation of the will and a statement of each party's interests. The trial court found that the will in question violated the Rule Against Perpetuities and ordered that the estate be divided among the testator's living heirs as tenants in common and per stirpes. The plaintiffs appeal. We vacate the decision of the trial court and remand for consideration of the cause in light of the Tennessee Uniform Statutory Rule Against Perpetuities, T.C.A. §§ 66-1-201 to -208.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court is Remanded

HOLLY M. KIRBY, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Vernon R. White, Akron, Ohio, appellant, Pro Se.

L. Daniel Johnson, Memphis, Tennessee, for appellees, Celia Welch, Beverly Welch Williams, Kenneth Welch and Russell Welch.

America E. Nelson, Kalamazoo, Michigan, appellee, Pro Se.

OPINION

Dr. Hillery W. Key ("Dr. Key") died testate in 1912. Paragraph six of his holographic will ("Will") devised the following:

I desire and will that my real estate shall be enjoyed by my children during their lives as tenants in common; then by my grandchildren during their lives and then by

my great-grandchildren until they become of age. Then said estate may be divided as the law directs. This bequest is of course subject to the bequests made above.

Dr. Key's children have died and his last living grandchild died in 1992. It appears from the record that he currently has twenty living great-grandchildren and twenty-nine living great-great-grandchildren.

In 1998, seventeen of Dr. Key's great-grandchildren (collectively, "the Plaintiffs"), asked the trial court to interpret Dr. Key's Will and state each party's interest in Dr. Key's estate. A hearing was held on November 4, 1999. Arguments were presented regarding application of the class gift doctrine and the Rule Against Perpetuities.¹ The trial court found that the class gift doctrine did not apply to the Will, but that the Will violated the Rule Against Perpetuities. The trial court stated:

It is argued by the plaintiffs that, because a great-grandchild was living at the time of Dr. Key's death, paragraph 6 of the will does not violate the Rule Against Perpetuities. However, it is clear that the test as to the Rule Against Perpetuities is not whether the property does vest within the time prescribed, but whether the interest must vest, if at all, not later than 21 years after some life in being at the creation of the interest. (Footnotes omitted). Obviously, there is the possibility of grandchildren and great-grandchildren being born after the termination of the lives in being at the time of Dr. Key's death, and that there was a possibility that the property would vest in unborn children of unborn children. Thus, the provision is void for remoteness.

Therefore, the trial court found that the Will violated the Rule Against Perpetuities. Based on this holding, the trial court held that the property would vest in Dr. Key's children, and that "all living heirs of Dr. Key own the property as tenants in common and per stirpes." From this order, the Plaintiffs appeal.

On appeal, the Plaintiffs argue that the Will does not violate the common law or statutory Rule Against Perpetuities and that the property should vest solely in the great-grandchildren of Dr. Key.

In 1994, the Tennessee legislature adopted the Tennessee Uniform Statutory Rule Against Perpetuities. Tenn. Code Ann. §§ 66-1-201 to -206 (Supp. 2002). Section 66-1-202 of the Tennessee Code Annotated states in part:

(a) A nonvested property interest is invalid unless one (1) of the following conditions is satisfied:

¹The record contains no trial transcript. It does, however, include a brief Statement of the Evidence.

(1) When the interest is created, it is certain to vest or terminate no later than twenty-one (21) years after the death of an individual then alive; or

(2) The interest either vests or terminates within ninety (90) years after its creation.

Tenn. Code Ann. § 66-1-202(a) (Supp. 2002). Thus, the statute incorporates a variation of the traditional common law Rule Against Perpetuities, stating that an interest in nonvested property can be valid if the interest vests or terminates within ninety years after its creation.² *See generally* Amy Morris Hess, *Freeing Property Owners From the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 Tenn. L. Rev. 267 (1995). In addition, section 66-1-204 of the Tennessee Code Annotated provides that, under certain circumstances, the disposition of property may be reformed.³

In the case at bar, the trial court correctly found that Dr. Key's Will violated the common law Rule Against Perpetuities. It appears from the record, however, that the Tennessee Uniform Statutory Rule Against Perpetuities was not argued to the trial court and was not considered by the trial court in its holding. Since the statute appears applicable, we must vacate the trial court's decision and remand the cause for consideration in light of the Tennessee Uniform Statutory Rule Against Perpetuities, including, but not limited to, sections 66-1-202 and -204 of the Tennessee Code Annotated.

²The statute applies retroactively to nonvested property interests, except for those the validity of which had been adjudicated or subject to settlement among interested parties prior to the statute's enactment. Tenn. Code Ann. § 66-1-206 (Supp. 2002). Therefore, the statute applies in the case at bar, even though the testator died in 1912.

³Section 66-1-204 of the Tennessee Code Annotated provides:

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the ninety (90) years allowed by §§ 66-1-202(a)(2), (b)(2) or (c)(2) if any of the following conditions is satisfied:

(1) A nonvested property interest or a power of appointment becomes invalid under the statutory rule against perpetuities provided in § 66-1-202;

(2) A class gift is not but might become invalid under the statutory rule against perpetuities provided in § 66-1-202, and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

(3) A nonvested property interest that is not validated by § 66-1-202(a)(1) can vest but not within ninety (90) years after its creation.

Tenn. Code Ann. § 66-1-204 (Supp. 2002).

The decision of the trial court is vacated and the cause remanded for further proceedings not inconsistent with this Opinion. Costs on appeal are taxed equally to the appellants, Lorenzo C. White and Vernon R. White, and their surety, for which execution may issue, if necessary.

HOLLY M. KIRBY, JUDGE